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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

**MICHAEL E. FRYZEL, Director,
Department of Financial Institutions,**

Petitioner,

VS.

CASH CURRENCY EXCHANGE, INC., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

COLUMBUS R. GANGEMI
Counsel of Record
NEAL L. WOLF
ADRIAN C. SMITH
ROBERT R. STEFFEK, JR.

Attorneys for Travelers Express Company, Inc., Respondent

Of Counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	iii
REASONS THIS PETITION FOR CERTIORARI SHOULD BE DENIED	3
CONCLUSION	8

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
First American Bank & Trust Co. v. George, 540 F.2d 343 (8th Cir.) *cert. denied*, 429 U.S. 1011 (1976)	3-4
McDougall v. Leuder, 389 Ill. 141, 58 N.E.2d 899 (1945)	3
Oulton v. German Savings & Loan Society, 17 Wall 109 (1973)	4
Woolsey v. Security Trust Co., 74 F.2d 334 (5th Cir. 1935)	5
United States Constitution	
U.S. Const. art. I §8, cl.4	7
U.S. Const. art. VI cl.2	7
Statutes	
11 U.S.C. §101(10)	6
11 U.S.C. §109(b)(2)	2, 3-6
11 U.S.C. §543	6
Ill. Rev. Stat. ch. 17, §§4801-4852	*passim*
Other Authorities	
H.R. Rep. No. 595, 95th Cong., 1st Sess. 370 (1977)	7
S. Rep. No. 989, 95th Cong., 2d Sess. 23 (1978)	7
S. Rep. No. 989, 95th Cong., 2d Sess. 84 (1978)	7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

U.S. Const. art. I §8, cl.4

> The Congress shall have Power To:
>
> > establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

U.S. Const. art. VI, cl.2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Laws

11 U.S.C. §101(10)
11 U.S.C. §109(b)(2)
11 U.S.C. §362(b)(4)
11 U.S.C. §543

State Laws

Ill. Rev. Stat. ch. 17, §4801 *et seq.*

(The text of the Federal and State laws are reprinted in Petitioner's Appendix C.)

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Respondent, Travelers Express Company, Inc. ("Travelers Express")[1] respectfully requests that the Petition for a Writ of Certiorari of Michael E. Fryzel, Director of the Illinois Depart-

[1] Travelers Express Company, Inc. is a wholly-owned subsidiary of The Greyhound Corporation. Its affiliates include Aircraft Service Intl., Inc., Armour-Dial, Inc., Armour Handcrafts, Inc., Armour International Co., Dispatch Services, Inc., Faber Enterprises, Inc., Florida Export Tobacco Co., Inc., Florida Export Warehouse Corp., Glacier Park, Inc., Consultants & Designers, Inc., Greyhound Exhibitgroup, Inc., Greyhound Temporary Personnel, Inc., Greyhound Capital Corporation, Greyhound Exposition Services, Inc., Greyhound Food Management, Inc., Greyhound Leasing & Financial Corp., Greyhound Lines, Inc., Greyhound Support Services, Inc., MCI Acceptance Corp., Verex Corp., New Mexico Transportation Co., Inc., Pine Top Insurance Company, Post House, Inc., Texas, New Mexico & Oklahoma Coaches, Inc., Transportation Manufacturing Corp., Universal Coach Parts, Ver-

ment of Financial Institutions (the "Director") be denied. This case is not worthy of certiorari because it determines only a simple question of Illinois law, whether a currency exchange is a bank. The Director argues that currency exchanges, forbidden by Illinois law from accepting deposits and not authorized to make loans, are banks, which may not be debtors under the Bankruptcy Code (the "Code"), 11 U.S.C. §101 *et seq.* Alternatively, the Director argues that, by enabling currency exchanges to seek bankruptcy relief, Congress wrongfully wrests control over the liquidation of currency exchanges from the states. The Director makes these arguments because he seeks to exercise complete control over the liquidation of currency exchanges whose capital is impaired and to deny such currency exchanges and their creditors the protection and reorganization alternatives which the Code provides.

By arguing that currency exchanges are the "substantial equivalent" of banks, the Director in essence asks the Court to create a new category of person or entity precluded from seeking bankruptcy relief under Section 109(b)(2) of the Code. In making this argument, the Director not only asks the Court to amend the Code, but to repudiate Illinois statutes and case law which clearly distinguish currency exchanges from banks.

By arguing, alternatively, that Congress wrongfully placed control over the liquidation of currency exchanges in the hands of the bankruptcy courts, the Director proposes to turn the entire federal system topsy-turvy and to have the Court rewrite both the Bankruptcy clause and the Supremacy clause of the Constitution. The Director does not assert any conflict between the Seventh Circuit and any other Circuit.

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mont Transit Co., Inc. These affiliates are either subsidiaries of The Greyhound Corporation or subsidiaries of such subsidiaries.

REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. Under Illinois Law, Currency Exchanges Are Not Banking Institutions

When the Director argues that "it is crucial that this Court provide insight into the true nature of services provided by community currency exchanges . . ." (P.C. at 9-10)[2], the Director overlooks the fact that both the Illinois legislature and the Illinois Supreme Court have prohibited currency exchanges from accepting deposits and thereby conducting banking business. Illinois statutory law prohibits currency exchanges from accepting deposits. Ill. Rev. Stat. ch. 17, §4804.3 (1983) (App. at C-6)[3] In upholding the prohibition, the Illinois Supreme Court specifically stated that the regulations of the Illinois Community Currency Exchanges Act, 17 Ill. Rev. Stat. ch. 17, §4801 *et seq.* (1983) (the "Currency Exchanges Act") are insufficient to allow currency exchanges to engage in banking business. *McDougall* v. *Leuder*, 389 Ill. 141, 151-52, 58 N.E.2d 899 (1945). The *McDougall* court stated:

> To allow currency exchanges to engage in such activities would be to allow them to engage in banking business without the regulations or reponsibilities attendant thereupon.

389 Ill. at 151-2. According to the Seventh Circuit, the power to accept deposits is the "touchstone" of the "state classification" test, the test courts apply to determine if an institution is classified as a bank by the state. *First American Bank & Trust Co.*

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[2] "P.C." refers to Petition for Certiorari.

[3] "App." refers to Petitioner's Appendix.

v. *George*, 540 F.2d 343 (8th Cir.) *cert. denied*, 429 U.S. 1011 (1976). (App. at A-16)[4]

The Director states that no court has ruled on whether currency exchanges constitute the equivalent of banking institutions under the "state classification" test. (P.C. at 9) While true, this argument overlooks the fact that Illinois, a state with extensive currency exchange regulations, has forbidden currency exchanges from engaging in banking business. This fact led both the Seventh Circuit and the District Court to conclude that Illinois currency exchanges were not substantially equivalent to the banking institutions precluded by Section 109(b)(2) from seeking relief under the Bankruptcy Code. The Illinois position is clear; there is no question of the "true" nature of currency exchange services for this Court to decide.

B. The Bankruptcy Court Did Not Improperly Interfere With The Illinois Currency Exchange Regulation System

The Director argues that the Bankruptcy Court has improperly interfered with the Illinois system of regulating and liquidating currency exchanges. As support, the Director contends that the "public interest" would be better served by giving priority to state regulation of currency exchanges over bankruptcy relief, and that bankruptcy would interfere with Illinois' "elaborate" scheme for liquidating currency exchanges. Both of these arguments are misplaced.

The argument that it would better serve the "public interest" to defer to state regulation of currency exchanges ignores the substance and purpose of the liquidation provisions of the Currency

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[4] This Court agrees. In *Oulton* v. *German Savings & Loan Society*, 17 Wall 109, 118 (1873), the Court stated:

> Strictly speaking, the term bank implies a place for the deposit of money as that is the most obvious purpose of such an institution.

Exchanges Act. The primary purpose of the liquidation provisions is to protect creditors, not to protect the public interest. The liquidation provisions speak only of the protection of creditors. Ill. Rev. Stat. ch. 17, §§ 4825-4830 (1983). (App. at C-24-27)

Although the Seventh Circuit recognized that by providing "vital services," currency exchanges affect the public interest, the Court specifically found that the liquidation provisions of the Currency Exchanges Act do not vindicate the public interest. That interest is served by the licensing, insurance and bonding requirements of the Currency Exchanges Act, which the turnover order did not affect. (App. at A-16-17)

The Director also contends that bankruptcy interferes with the Illinois liquidation scheme, citing *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935). In *Woolsey*, the Fifth Circuit held that an "elaborate scheme of liquidation," which a state created to regulate its trust companies, could not be overridden by bankruptcy proceedings. The Director's reliance on the *Woolsey* case is misplaced. Far from an elaborate scheme, the Illinois liquidation scheme is, in the words of the Seventh Circuit, "skeletal." (App. at A-15)

The liquidation provisions do not address the public funds which are at risk during "the float" period, nor do they provide for the reorganization or rehabilitation of an insolvent currency exchange. When the District Court compared the liquidation provisions of the Currency Exchanges Act to those of other Illinois entities specifically excluded from bankruptcy relief by Section 109(b)(2), it found a "stark contrast." (App. at B-13-15)

Had the Illinois legislature recognized a strong public interest in direct state supervision and control of liquidation of currency exchanges, it would have provided a more elaborate liquidation scheme. Instead, the legislature formulated six sections which are primarily aimed at protecting the interests of creditors. The Bankruptcy Code more than adequately protects that interest. It

does so in an elaborate statutory scheme which puts creditors on an equal footing with one another, provides safeguards against loss or diminution of the estate, grants broad powers to the bankruptcy trustee or debtor in possession to avoid preferences, fraudulent conveyances, and unperfected liens, and gives creditors a substantial voice in the reorganization process. Few, if any, of these features are present in the state liquidation scheme.

C. The Seventh Circuit's Holding That The State-Appointed Receiver Was A Custodian Within The Meaning Of Section 101(10) Of The Bankruptcy Code Does Not Violate The Separation Of Powers Doctrine

The Director argues that, as an administrative receiver under Illinois law, the state-appointed receiver had exclusive title to and control of the Debtor's assets, and that the appointment of the Chapter 11 trustee violated the separation of powers doctrine. Once again, the Director's argument misses the point and merely repeats the same arguments rejected by the District Court and the Seventh Circuit.

The Director's argument also overlooks the plain language of the Code. Section 543(b)(1) of the Code provides that a custodian of property of a debtor must turn over such property to the debtor or to the bankruptcy trustee. Section 101(10) defines custodian as follows:

> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. §101(10). (App. at C-1)

Although the Director acknowledges that the legislative history of Section 101(10) recognizes that the categories of custodian are descriptive rather than exhaustive, S.Rep. No. 989, 95th Cong. 2d Sess. 23(1978), the Director argues that the term "custodian" encompasses only court-approved receivers and not administrative receivers. The unrestrictive language of the statute does not support this argument. Both the Seventh Circuit and the District Court so found.

Moreover, the fact that the receiver had title to the Debtors' property under Illinois law is irrelevant. The legislative history of Section 543 expressly supports the conclusion that the term "custodian" includes prepetition liquidators who hold title to a debtors' assets. The legislative history defines the property of the debtor which must be turned over to the bankruptcy trustee:

> Property of the debtor in section (a) includes property that was property of the debtor at the time the custodian took the property, but the title to which passed to the custodian.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 370(1977); S. Rep. No. 989, 95th Cong., 2d Sess. 84 (1978).

Neither considerations of federalism nor the separation of powers doctrine ought alter the result in this case. Indeed, such considerations *support* the result. Congress alone has the power to establish uniform laws on bankruptcy, and the states cannot interfere with that power. U.S. Const. art. I §8, cl.4; U.S. Const. art. VI, cl.2. Title 11 specifically precludes certain entities from seeking bankruptcy relief, and suspends state insolvency proceedings in all other cases in which bankruptcy jurisdiction is invoked. Illinois currency exchanges are not precluded from seeking and obtaining relief under the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, respondent Travelers Express Company, Inc. respectfully requests that the Petition for a Writ of Certiorari of Michael E. Fryzel, Director, Department of Financial Institutions be denied.

Respectfully submitted,

COLUMBUS R. GANGEMI
Counsel of Record
NEAL L. WOLF
ADRIAN C. SMITH
ROBERT R. STEFFEK, JR.

Attorneys for Respondent
Travelers Express
Company, Inc.

Of counsel:

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603